SUPREME COURT, U.S.
FILED
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No.

In The
Supreme Court Of The United States

ROBERT ALAN STARR,

Petitioner,

v.

CHERYL K. PLILER; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure to set forth a standard of review for issuance of a certificate of appealability by the Court of Appeal for the Ninth Circuit is a denial of due process yielding an unjustified departure from the accepted and usual course of judicial proceedings.

2. Whether the denial of the certificate of *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983).

3. Whether application of the *Barefoot v. Estelle* appealability is unacceptably in conflict with the procedures adopted by six other circuits, which utilize the standard for issuance of a certificate of probable cause to appeal as stated in standard requires issuance of a certificate of appealability.

LIST OF PARTIES

All parties are listed in the caption.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Robert Alan Starr, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Ninth Circuit rendered on June 23, 1999.

OPINIONS BELOW

On June 23, 1999 the court of appeals entered its order denying petitioner's motion for reconsideration of the court's April 1, 1999 order denying petitioner's request for certificate of appealability pursuant to 28 U.S.C. § 2253. A copy of the June 23, 1999 order is supplied in the Appendix at App. 1.

JURISDICTION

On June 23, 1999 the court of appeals entered its order denying petitioner's motion for reconsideration of the court's April 19, 1999 order denying petitioner's request for certificate of appealability pursuant to 28 U.S.C. § 2253. [App. A]. Jurisdiction of this Court is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor,

and to have the Assistance of Counsel for his defense."

Title 28, United States Code § 2253:

(a) In a habeas corpus proceeding or a proceeding under § 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) The final order in a habeas corpus proceeding in which the detention complained or arises out of

process issued by a State court; or

(B) The final order in a proceeding under § 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

Federal Rules of Appellate Procedure, Rule 22:

(a) Application for the Original Writ. An application for a writ of habeas corpus must be made to the appropriate district court. If made to a circuit judge, the application must be transferred to the appropriate district court. If a district court denies an application made or transferred to it, renewal of the application before a circuit judge is not permitted. The applicant may, under 28 U.S.C. § 2253, appeal to the court of appeals from the

district court's order denying the application.

(b) Certificate of Appealability.

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c). If an applicant files a notice of appeal, the district judge who rendered the judgment must either issue a certificate of appealability or state why a certificate should not issue. The district clerk must send the certificate or statement to the court of appeals with the notice of appeal and the file of the district-court proceedings. If the district judge has denied the certificate, the applicant

may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed, the notice of appeal constitutes a request addressed to the judges of the court of appeals.

(3) A certificate of appealability is not required when a state or its representative or the United States or its representative appeals.

Ninth Circuit Rule 22-1:

(a) General Procedures. The procedures set forth in Fed. R. App. P. 22(b) shall apply to requests for certificates of appealability in proceedings under 28 U.S.C. § 2254 and § 2255. A certificate of appealability must be considered by the district court. If the district court grants a certificate of appealability, it shall state which issue(s) satisfy the standard set forth in

28 U.S.C. § 2253(c)(2). The Court of Appeals will not act on a request for a certificate of appealability if the district court has not first ruled on the request.

(b) District Court Records. If the district court denies a certificate of appealability in a § 2254 proceeding, the district court clerk shall forward the entire record to the court of appeals. If the district court denies a certificate of appealability in a § 2255 proceeding, the district court clerk shall forward that portion of the record beginning with the filing of the § 2255 motion.

(c) Denial In Full By District Court; Motion By Petitioner. If the district court denies a certificate of appealability as to all issues, petitioner may, within thirty-five days of the district court's entry of its order denying a certificate of appealability, file in the court of appeals a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue(s). If no motion for a certificate of appealability is filed, the court of appeals will deem the notice of appeal to constitute a request for a certificate of appealability. In either case, the respondent may file a response within thirty-five days of the notice of appeal or motion, whichever

is later. In capital cases where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after the date petitioner's motion is served or, if no motion is filed, as soon as practicable after the district court's entry of its order denying a certificate of appealability.

(d) Partial Denial by District Court; Motion By Petitioner. If the district court denies a certificate of appealability in part, the court of appeals will not consider uncertified issues unless petitioner first seeks, and the court of appeals grants, broader certification. Petitioners desiring broader certification must file, in the court of appeals, a separate motion for broader certification, along with a statement of reasons why a certificate should be granted as to any issue(s) within thirty-five days of the district court's entry of its order denying a certificate of appealability. Respondent may file an opposition within thirty-five days of the date petitioner's motion is served. If a motion for broader certification is filed in a capital case where an execution date is scheduled and no stay is in place, respondent shall file a response as soon as practicable after service of

the motion. Otherwise, respondent shall file a response within thirty-five days of the date petitioner's motion is served.

STATEMENT OF CASE

In August 1987 notice of an arrest warrant naming petitioner for alleged robberies was transmitted statewide by the Los Angeles Sheriff's Department ("LASD"). Petitioner was arrested on the warrant in April 1988 in El Dorado County, California. The arresting authorities immediately notified the LASD of petitioner's arrest. Los Angeles County authorities received the notification, acknowledged it but did nothing to obtain petitioner. Instead, petitioner was turned over to federal authorities on an unrelated matter. He remained in federal custody until 1993 in which time he was extradited to appear in connection with this August 1987 California arrest warrant.

On August 12, 1993, petitioner moved to dismiss the state court action based on California's denial of his right to a speedy trial. The motion was denied and following a jury trial, petitioner was found guilty and sentenced to state prison for 17 years, 8 months.

Petitioner timely appealed to the Second District Court of Appeal for California. In an unpublished opinion, the state court of appeals affirmed the conviction.

Petitioner timely sought review by the California Supreme Court. The state supreme court denied review without comment.

Having exhausted his state court remedies, petitioner timely filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California on April 3, 1998.

On January 14, 1999, United States District Judge Laughlin E. Waters denied petitioner's Petition for Writ of Habeas Corpus and dismissed the action.

On February 9, 1999 petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253.

On February 25, 1999 United States District Judge Dean D. Pregerson issued an order denying the request for a Certificate of Appealability, on the basis that "[t]here had been no substantial showing of the denial of a constitutional right." The order gave no explanation. A box quoting language from 28

U.S.C. § 2253 was merely checked off. A copy of this order is supplied in the Appendix at App. 2.

Pursuant to Ninth Circuit Rule 22-1, petitioner timely filed in the Court of Appeals for the Ninth Circuit a Motion for a Certificate of Appealability and Statement of Reasons Why A Certificate Should Issue. A copy of this motion is supplied in the Appendix beginning at App. 5. On April 19, 1999 the Ninth Circuit denied petitioner's request for a certificate of appealability, without any comment or explanation. A copy of this denial is supplied in the Appendix at App. 4.

On May 3, 1999, petitioner filed a Motion to Reconsider Denial of Motion For A Certificate of Appealability and Statement of Reasons Why a Certificate Should Issue. The motion to reconsider was based on the fact that the Court of Appeals for the Ninth Circuit has no stated standard of review as to issuance of certificates of appealability. A copy of this motion is supplied in the Appendix at App. 23. On June 23, 1999 the court of appeals denied the motion for reconsideration stating that the court would not clarify, modify or reconsider its order. (App. 1)

FACTS RELATING TO THE UNDERLYING PETITION FOR WRIT OF HABEAS CORPUS DENIED BY THE DISTRICT COURT.

This case arises from charges stemming from robberies which occurred at beauty salons in 1987.

An arrest warrant for the underlying case was issued in August of 1987 by the Los Angeles Sheriff's Department ("LASD"). Petitioner was arrested in April of 1988 in El Dorado County, California on the warrant.[1] At the time of the arrest, in April, 1988, the arresting authorities notified LASD of the arrest and, by return communiqué, LASD acknowledged receipt of that information.

Soon after his arrest, petitioner plead guilty to federal charges and was continuously in the custody of federal authorities until 1993 when the County of Los Angeles finally contacted federal authorities to begin the prosecution of petitioner for events which occurred in August of 1987. Petitioner did nothing to hide his whereabouts. To the

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[1] In the district court pleadings, a misstatement by petitioner's counsel lead to ambiguity about the fact that petitioner was arrested on the Los Angeles warrant. Petitioner attempted to clarify the issue and requested an evidentiary hearing should any ambiguity remain.

contrary, he asked his counsel in the federal action to make sure no cases were outstanding. His counsel found no record of the underlying case. Two federal presentence reports failed to uncover the underlying case.

Despite being notified of his arrest in 1988, and despite being sent a detainer action letter by federal authorities in 1989, no efforts of any type were undertaken by Los Angeles County law enforcement authorities to locate petitioner until 1993 when Los Angeles County authorities finally responded to a second detainer action letter and accepted custody of petitioner.

Instead of seeking out petitioner during this period of delay, law enforcement authorities willfully destroyed the investigative file for the case, which included a photographic six-pack purportedly used to identify petitioner at the time of the crimes alleged.

Before trial, petitioner moved to dismiss the action for the apparent violation of his speedy trial rights. The motion was denied without prejudice.

Petitioner was faced at trial with the daunting task of demonstrating an alibi in 1994 for events which occurred in August

1987. One alibi witness, James Winter, was located but, because of the passage of time, could not vouch for the dates and the times of the crimes. Moreover, despite the destruction of the photographic six-pack, the trial court allowed the prosecution to refer to identifications made from that six-pack. The trial court allowed this over objection, even though the six-pack was willfully destroyed and despite the fact that a later six-pack used by the prosecution was demonstrated to be unduly suggestive.

At trial, no physical evidence was presented linking petitioner to any of the crimes. No guns, no matching clothes, no fingerprints, nothing. Only eyewitness testimony was adduced. As demonstrated by a defense expert, such testimony under the circumstances at hand was deeply flawed.

As a further result of the delay in prosecution, petitioner lost the opportunity to negotiate for sentences which would have run concurrently with the federal sentence he served from 1988 through 1993.

REASONS FOR GRANTING THE WRIT

I The Court of Appeals for the Ninth Circuit is denying certificates of appealability without any standard of review, an unjustifiable departure from the accepted and usual course of judicial proceedings.

The Anti-Terrorism and Effective Death Penalty Act of 1996 amended 28 U.S.C. § 2253 to require a defendant to obtain a certificate of appealability ("COA") before appealing a district court's denial of a petition for writ of habeas corpus. 28 U.S.C. § 2253(c)(1). A COA will issue upon "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The showing must address the issues the defendant wishes to appeal. 28 U.S.C. § 2253(c)(3).

The Court of Appeals for the Ninth Circuit has not decided what standard governs the issuance of a COA. Lacking any standard whatsoever, the Ninth Circuit practice constitutes a denial of procedural due process which is a distant departure "from the accepted and usual course of judicial proceedings" as described in Rule 10(a) of the Supreme Court Rules.

It is axiomatic that a standard must be determined. Otherwise litigants must guess as to the standard being used, if any. Without a recognized standard, district judges will have no uniformity in the decision-making process. The fact that district courts are using pre-printed forms to notify litigants whether a COA will issue, exacerbates the mystery. See App. 2.

The absence of a standard leaves open the very real possibility that circuit judges within the same panel might be determining the matter using different standards of review.

The consequences of this situation are severe. Given the terminating effect to petitioner's claims of constitutional deprivation, it is fundamentally unfair for the circuit to formulate a rule (Circuit Rule 22-1), under which petitioner was authorized to move the Circuit for a COA without a standard for obtaining the COA.

Petitioner is suffering a sentence which exceeds seventeen years. He was blatantly denied a speedy trial. Yet, he has been denied the right to a federal appeal concerning important constitutional rights based on a box being checked off by the district judge and denial of a COA, without any explanation and without any standard. The COA process is

not intended to be a de facto discretionary appeal process. Certiorari is a procedure utilized only by this honorable Supreme Court.

Apparently fueled by the perceived need to process cases, this kafkaesque practice is so lacking in procedural due process considerations that it has departed from the course of judicial proceedings expected in this country. It follows from Rule 10(a) of this Supreme Court's rules that this case warrants review on a writ of certiorari.

II The Court of Appeals for the Ninth Circuit should adopt the standard utilized by six other circuits, which mirrors the standard governing the issuance of a certificate of probable cause.

While the Ninth Circuit has failed to set a standard of review, at least sixth other circuits have done so, and in doing so, they have applied the standard applied to issuance of a certificate of probable cause to appeal ("CPC") which was in effect for state prisoners prior to passage of the Anti-Terrorism and Effective Death Penalty Act of 1996.[2]

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[2] *See, e.g.*, Tejeda v. Dubois, 142 F.3d 18, 1998 U.S. App. LEXIS 8075 at CAI.L, n. 4 (1st Cir. 1998); Byrd v. Henderson, 199 F.3d 34, 36 n.3 (D.C. Cir. 1997); Lyons v. Ohio Adult Parole Authority, 105 F.3d 1063, 1073 (6th Cir.), cert. Denied, 117 S.Ct. 1724

The above CPC standard of review was set forth in *Barefoot v. Estelle*, 463 U.s. 880, 103 S.Ct. 3383 (1983). The standard in *Barefoot* is that a CPC should be granted if the petitioner makes a showing that "the issues are debatable among jurists of reason," and that, "a court could resolve the issues [differently]; or that the questions are 'adequate to deserve encouragement to proceed further.'" Id. At 893, n. 4, 103 S.Ct. at 3394, n. 4. Quoting *Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980).

Rule 10(a) of the Supreme Court Rules sets forth as a basis for granting review, a conflict with another court of appeals "on the same important matter." The conflict at hand is apparent. The Ninth Circuit has no standard of review. Six circuits have adopted an appropriate standard. The issue is vitally important as the deciding factor terminating the rights of litigants convicted of crimes.

(1997); Drinkard v. Johnson, 97 F.3d 751, 756 (5th Cir. 1996), cert. Denied, 117 S. Ct. 1114 (1997); Herrera v. United States, 96 F.3d 1010, 1012 (7th Cir. 1996); Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996); Lennox v. Evans, 87 F.3d 431, 433-34 (10th Cir. 1996), cert. Denied, 117 S.Ct. 746 (1997), overruled on other grounds, United States v. Kunzman, 125 F.3d. 1363 (10th Cir. 1997).

III Application of the CPC standard leads to the conclusion that a COA should issue for both of appellant's issues on appeal.

1. Jurists of reason could debate whether petitioner was denied his Sixth Amendment right to a speedy trial or, a court could resolve the issues differently, or, the matter is adequate to deserve encouragement to proceed further.

The district court's findings below were premised on the mistaken reading of the record that the petitioner was not arrested pursuant to a Los Angeles County warrant when, in fact he was arrested pursuant to the Los Angeles warrant. The record substantiates petitioner's account of being arrested on a Los Angeles warrant. So, the matter is at least worthy of an evidentiary hearing. Yet, the district court ignored the factual mistake and decided that the Sixth Amendment right did not attach.

If the right attached at the time of his arrest, petitioner was entitled to have his case dismissed.

Applying the four factors in *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), yields the inevitable conclusion that

petitioner's case should have been dismissed. The first factor, length of the delay, is at least five years. The length of delay is five times greater than what is recognized as presumptively prejudicial. As to the next factor, the reason for the delay, it is indisputable that the prosecution and law enforcement failed completely. The evidence is conclusive that nothing was ever done to locate petitioner.

In *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992), the court noted that "tolerations of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of an accused's trial." *Id.* at 532. The court observed that the prosecution can hardly complain in that "persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it." *Id.*

The fact of the government's lack of diligence when combined with the seriousness of the charge make this case "adequate to deserve encouragement to proceed further." It follows that for this reason alone, the COA should issue.

Insofar as a defendant's assertion of his right to a speedy trial, the warrant did not appear on petitioner's 1988 and 1991 Presentence Reports.

Additionally, the testimony revealed that there was never a detainer placed on petitioner while he was in federal custody until his late extradition. Information provided by petitioner's counsel at the time demonstrated that petitioner was unaware of the pending charges.

As to the fourth factor, prejudice to a defendant, the events at trial clearly demonstrate prejudice. The destruction of evidence and the difficulties in demonstrating petitioner's alibi defense makes absurd any assertion that there was no prejudice. It is well settled that there is a possibility of unfairness when photographic identifications are utilized. *Simmons v. United States*, 390 U.S. 377, 378, 88 S.Ct. 967, L.Ed.2d 1247 (1968).[3]

This circuit decided two cases stemming from *Doggett* concerning the prejudice issue. In *United States v. Shell*, 974 F.2d 1035 (9th Cir. 1992), the Court of Appeal recognized that no showing of prejudice is necessary when the delay is great and attributable to the government.

In *United States v. Beaman*, 992 F.2d 1009 (9th Cir. 1993), the Court of Appeal found 17 and 20 month delays between indictment and arrest to be

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[3] In Simmons, the prosecution did not even refer to the photographs in their case-in-chief. The defense was contending that because the photographs were unavailable in discovery, there was a violation of the discovery requirements of the Jencks Act.

so "presumptively prejudicial" as to prompt a speedy trial inquiry. *Id.* at 1013.

It is clear that an arrest, coupled with filed charges, triggers the Sixth Amendment right to a speedy trial. See, *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); see also, *United States v. MacDonald*, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 673 1995) [California Right to Speedy Trial "attaches upon the filing of the complaint."; quoting *People v. Harmon*, 19 Cal.3d 588 (1977)].

The arrest of petitioner, coupled with outstanding charges made him an "accused" by the rationale in *Marion* and *MacDonald*.

The district court did not even make the effort of setting an evidentiary hearing on the vital issue of whether petitioner was arrested pursuant to the Los Angeles warrant.

A cursory examination of the above factors must lead to the conclusion that jurists of reason can debate the issues above, could resolve the issues differently, and that the questions are adequate to deserve encouragement to proceed further.

2. Jurists of reason could debate whether petitioner was denied his Fifth Amendment due process rights, or, a court could resolve the issue differently, or, the issue is adequate to deserve encouragement to proceed further.

Shleffar v. Superior Court, 178 Cal.App.3d 937 (1986) and *Scherling v. Superior Court*, 22 Cal.3d 239 (1978) analyze the speedy trial issue. Each case requires first that prejudice from the delay be established by the defendant. Once established, the prosecution must then justify the delay, after which the court must "balance the harm to defendant against the reasons for the delay . . ." *Shleffar*, *supra*, at 945.

Notwithstanding the lower court's findings, the actual prejudice to petitioner is apparent and not speculative. The faded memory of an alibi witness is not speculative, nor is the potential loss of concurrent sentences, nor is the harm done by lost photographic lineup evidence, which the trial court allowed in by hearsay evidence.

In *Stabio v. Superior Court*, 21 Cal.App.4th 1488 (1994), the court of appeal considered a situation in which there was a four year delay in arresting the defendant, who was charged with

> felony grand theft. The Court in *Stabio* found that because the delay exceeded the statute of limitations for the crime, because law enforcement officials did not make even a minimal effort to locate Mr. Stabio from information in the public records, the presumption of prejudice was not extenuated or persuasively rebutted. The *Stabio* Court found that the statute of limitations is entitled to great weight in any speedy trial inquiry. Any such balancing warranted reversal. As discussed above, the prejudice at hand is legally presumed and the actual prejudice is substantial. There was **no justification** for the delay, so it follows that any balancing invariably falls in petitioner's favor.

To deny petitioner a COA is to say that there can be no debate about whether he suffered prejudice. To deny him a COA is to say that no court could resolve this case differently. To deny petitioner at COA is to say that this issue is not adequate to deserve encouragement to proceed further.

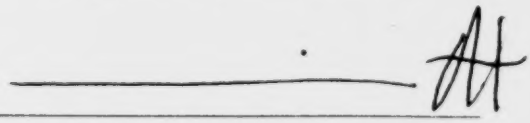
Were petitioner's constitutional claims denied for failure to satisfy the *Barefoot* standard or any standard? The Ninth Circuit will not say.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the petition for writ of certiorari should be granted.

Dated: November 22, 1999

Respectfully submitted,



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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:
Jun 23 1999

ROBERT ALAN STARR,	)	No. 99-55336
	)	
Petitioner-Appellant,	)	DC# CV-98-
	)	02472-LEW-RC
v.	)	Central
	)	California
CHERYL K. PLILER;	)	
ATTORNEY GENERAL OF	)	ORDER
THE STATE OF	)	
CALIFORNIA,	)	
	)	
Respondents-	)	
Appellees.	)	
_____/		

Before: BRUNETTI and LEAVY, Circuit Judges.

The motion for reconsideration of this court's April 19, 1999 order is denied.

No motions for reconsideration, modification, or clarification of this order or the court's April 19, 1999 order shall be filed or entertained.

S:\RESEARCH\COA's\Recon Motions\99-55336.wpd

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Filed:
Feb 25 1999

ROBERT ALAN STARR,	) Case No. CV-98-) 2472 DDP (RC)
Petitioner	)
v.	) ORDER RE:) CERTIFICATE) OF
CHERYL K. PLILER and ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,	) APPEALABILITY))))
Respondents.	)

On February 9, 1999 Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is **GRANTED**. The specific issue(s) satisfy § 2253(c)(2) as follows:

_____

_____

❑ The Certificate of Appealability is **DENIED** for the following reason(s):

☒ There has been no substantial showing of the denial of a constitutional right.

❑ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

❑ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: 2-25-99 /s/ Dean D. Pregerson

DEAN D. PREGERSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:
Apr 19 1999

ROBERT ALAN STARR,	)	No. 99-55336
	)	
Petitioner-Appellant,	)	DC# CV-98-
	)	02472-LEW-RC
v.	)	Central California
	)	
CHERYL K. PLILER;	)	ORDER
ATTORNEY GENERAL OF	)	
THE STATE OF	)	
CALIFORNIA,	)	
	)	
Respondents-Appellees.	)	
	/	

Before: BRUNETTI and LEAVY, Circuit Judges.

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:
Apr 1, 1999

ROBERT ALAN STARR,	NO. 99-55336
Petitioner-Appellant,	PETITIONER-APPELLANT'S MOTION FOR A CERTIFICATE OF APPEALABILITY AND STATEMENT OF REASONS WHY A CERTIFICATE SHOULD ISSUE DECLARATION OF MICHAEL ARTAN
v.	
CHERYL K. PLILER,	
Respondent-Appellee	
ATTORNEY GENERAL OF THE STATE OF CALIFORNIA	
Respondent-Appellee	
_____/	[CIRCUIT RULE 22-1(c)]

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Counsel for Petitioner-Appellant
Robert Alan Starr

Pursuant to Circuit Rule 22-1(c), petitioner/appellant Robert Alan Starr files this motion for certificate of appealability and statement of reasons why a certificate should issue. The district court's denial was filed on February 25, 1999, with the stated reason that "there has been no substantial showing of a denial of a constitutional right."

Dated: March 31, 1999 /s/ Michael Artan

Michael Artan
Counsel for
Petitioner/Appellant
Robert Alan Starr

MOTION FOR A CERTIFICATE OF APPEALABIILTY AND STATEMENT OF REASONS WHY A CERTIFICATE SHOULD ISSUE

I. INTRODUCTION

Petitioner/Appellant Robert Alan Starr ("Petitioner" or "Starr") has been denied his Sixth Amendment right to a speedy trial and his Fifth Amendment due process rights because of an unjustified five year delay in prosecution which resulted in prejudice to the defense.

Petitioner pursued his state appeal rights in a timely way. He timely filed a petition for writ of habeas corpus in the district court. The district court adopted the Magistrate Judge's Report and dismissed the petition.

The record of this case clearly shows that petitioner's constitutional rights were violated, and blatantly so.

The denial of rights was caused by the fact that petitioner was arrested in April 1988 on a Los Angeles County warrant for the underlying case. Los Angeles County authorities were notified of petitioner's arrest in April 1988. Petitioner was then taken into federal custody for bank robberies. He plead guilty and began serving his federal sentence.

Los Angeles authorities were again notified of petitioner's arrest status by federal prison officials in 1989; nothing was done by Los Angeles authorities

to secure petitioner's presence until 1993, as he was being released.

Petitioner suffered extreme actual prejudice because of the five year delay. The police investigative file was destroyed in the interim, an alibi witness's memory faded and petitioner lost the opportunity for concurrent state and federal sentences.

The denial of petitioner's constitutional right is egregious, apparent and a certificate of appealability should issue.

II. SUMMARY OF RELEVANT FACTS[1]

This case arises from charges stemming from robberies which occurred at beauty salons in 1987.

An arrest warrant for the underlying case was issued in August of 1987 by the Los Angeles Sheriff's Department ("LASD"). Petitioner was arrested in April of 1988 in El Dorado County, California on the warrant.[2] At the time of the arrest, in April, 1988, the arresting authorities notified

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[1] The facts referred to in this motion are found in the district court record of the case, particularly petitioner's district court pleadings. Petitioner is presenting only a summary because the detailed chronology is set forth in the underlying district court pleadings. See, Declaration of Michael Artan.

[2] In the district court pleadings, a misstatement by petitioner's counsel lead to ambiguity about the fact that petitioner was arrested on the Los Angeles warrant. Petitioner attempted to clarify the issue and requested an evidentiary hearing should any ambiguity remain.

LASD of the arrest and, by return communiqué, LASD acknowledged receipt of that information.

Soon after his arrest, petitioner plead guilty to federal charges and was continuously in the custody of local California or federal authorities until 1993 when the County of Los Angeles finally contacted federal authorities to begin the prosecution of petitioner for events which occurred in August of 1987. Petitioner did nothing to hide his whereabouts. To the contrary, he asked his counsel in the federal action to make sure no cases were outstanding. His counsel found no record of the underlying case. Two federal presentence reports failed to uncover the underlying case.

Despite being notified of his arrest in 1988, and despite being sent a detainer action letter by federal authorities in 1989, no efforts of any type were undertaken by Los Angeles County law enforcement authorities to locate petitioner until 1993 when Los Angeles County authorities finally responded to a second detainer action letter and accepted custody of petitioner.

Instead of seeking out petitioner during this period of delay, law enforcement authorities willfully destroyed the investigative file for the case, which included a photographic six-pack purportedly used to identify petitioner at the time of the crimes alleged.

Before trial, petitioner moved to dismiss the action for the apparent violation of his speedy trial rights. The motion was denied without prejudice.

Petitioner was faced at trial with the daunting task of demonstrating an alibi in 1994 for events which occurred in August 1987. One alibi witness, James Winters, was located but, because of the passage of time, could not vouch for the dates and the times of the crimes. Moreover, despite the destruction of the photographic six-pack, the trial court allowed the prosecution to refer to identifications made from that six-pack. The trial court allowed this over objection, even though the six-pack was willfully destroyed and despite the fact that a later six-pack used by the prosecution was demonstrated to be unduly suggestive.

At trial, no physical evidence was presented linking petitioner to any of the crimes. No guns, no matching clothes, no fingerprints, nothing. Only eyewitness testimony was adduced. As demonstrated by a defense expert, such testimony under the circumstances at hand was deeply flawed.

As a further result of the delay in prosecution, petitioner lost the opportunity to negotiate for sentences which would have run concurrently with the federal sentence he served from 1988 through 1993.

III. THERE HAS BEEN A SUBSTANTIAL SHOWING OF A CONSTITUTIONAL RIGHT.

A. Petitioner May File A Motion For Certificate Of Appealability

This Court of Appeals has jurisdiction only to consider claims for which a petitioner has made a substantial showing of a constitutional right. See, 28 U.S.C. Section 2253(c)(2).

According to 28 U.S.C. section 2253(c), a petitioner seeking appellate review must obtain a certificate of appealability.

In cases in which a district court denies a certificate, the petitioner may request a circuit judge to issue the certificate. See, Rule 22, Federal Rules of Appellate Procedure.

If the district court denies a certificate of appealability, a petitioner may file with the Circuit Court a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue, within thirty-five days of the district court entry of the denial order. See, Circuit Rule 22-1,

The district court was filed on February 25, 1999. It follows that this motion is due on April 1, 1999.

B. Petitioner Was Denied His Sixth Amendment Right To A Speedy Trial

In Barker v. Wingo 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101, (1972) the United States Supreme Court established a balancing test for determining whether the defendant has been denied his right to a speedy trial. In that balancing test, the conduct of both the prosecution and defendant are weighed, with the "primary burden on the courts and on the prosecutors to assure that cases are brought to

trial." Id. At p. 529, 92 S.Ct. at 2191. In Barker, four determinative factors were identified: length of delay, reason for delay, defendant's assertion of his right, and prejudice to the defendant. These four factors were found to be among various factors which are related and should be prejudice to prove because times erosion of exculpatory evidence and testimony 'can rarely be shown' . . . [t]hus we generally have to recognize that excessive delay presumptively compromises the reliability of the trial in ways that neither party can prove or, for that matter, identify." Doggett, supra, 120 L.Ed.2d at 530-531. The court noted that while presumptive prejudice does not by itself carry a Sixth Amendment claim without regard to the other Barker criteria, "its importance increases with the length of delay." Doggett, Id. At 331. See also, Serna v. Superior Court, 40 Cal.3d 239, 219 Cal.Rptr. 420 (1985).

Applying the four factors recognized by the United States Supreme Court in determining a defendant's speedy trial claim, yields the inevitable conclusion that petitioner's case should have been dismissed. The first factor, length of delay, is at least five years. The Complaint was filed in October of 1987, petitioner was taken into custody in April, 1988, and he was not extradited until mid-1993. The length of delay is five times greater than what the Doggett court recognized as presumptively prejudicial. As to the next factor, the reason for the delay, it is indisputable that the prosecution and law enforcement failed completely. In 1988, the El

Dorado County Sheriff's Department sent an administrative message to the Los Angeles County Sheriff's Department stating that petitioner was arrested on their warrant and nonetheless, Los Angeles County did nothing to secure Mr. Starr's appearance. In March, 1989, federal authorities sent out a Detainer Action Letter notifying Los Angeles County Sheriff's Department that petitioner was in federal custody in Lompoc, California and nothing was done by the Los Angeles County Sheriff's Department. The contention is that they never received these messages. The evidence is conclusive however that nothing was ever done to locate petitioner.

In Doggett, the court noted that "toleration of such negligence varies inversely with its protractedness . . . and its consequent threat to the fairness of an accused's trial." Id. at 532. The court observed that the prosecution can hardly complain in that "persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it." Id.

Insofar as a defendant's assertion of his right to a speedy trial, the Court in Doggett found that the defendant had no knowledge of the charges against him and could not be expected to assert his right. The court below found that petitioner was aware of the warrant.[3] However, the warrant did not appear

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[3] A point which petitioner contests.

on petitioner's 1988 and 1991 Presentence Reports. Additionally, the testimony revealed that there was never a detainer placed on petitioner while he was in federal custody until his late extradition. Information provided by petitioner's counsel at the time demonstrated that petitioner was unaware of the pending charges.

As to the fourth factor, prejudice to a defendant, the court below found before trial that in light of the fact that none of the witnesses had been identified,[4] prejudice was a "neutral" factor. However, the later events at trial clearly rebut this finding of "neutrality." The law in Doggett makes it abundantly clear that a delay of this period could not have been neutral.

The destruction of evidence and the difficulties in demonstrating petitioner's alibi defense makes absurd any assertion that there was no prejudice. It is well settled that there is a possibility of unfairness when photographic identifications are utilized. Simmons v. United States, 390 U.S. 377, 378, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)[5] As long as the photographic displays are preserved and available at trial, counsel for the accused may use them in cross-examination to reveal the possibility of prejudice and impugn the identification testimony.

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[4] Winters was not identified to the court at that time.

[5] In Simmons, the prosecution did not even refer to the photographs in their case-in-chief. The defense was contending that because the photographs were unavailable in discovery, there was a violation of the discovery requirements of the Jencks Act.

People v. Lawrence, 4 Cal.3d 273, 278-279, 93 Cal.Rptr. 204 (1971). As illustrated by expert testimony at trial, a six-pack can be highly unfair, to the point of having only one viable alternative among the six. When the photographs are preserved, the court "sees exactly what the witness saw, and an absolute duplication of the identification procedure is possible." People v. Lawrence, 4 Cal.3d 273, 279, n.2, 93 Cal.Rptr. 204, n.2 (1971) [discussing People v. Fowler, 1 Cal.3d 335, 82 Cal.Rptr. 363, 461 P.2d 643 (1969), in which the California Supreme Court rejected the prosecution's contention that line-up could be duplicated photographically in counsel's absence]. Because the photographs were unavailable, the prosecution was allowed to repeatedly refer to the photographs, while the defense was prejudice further.

Moreover, with the passage of many years, the importance of the 1987 identifications was heightened. The defense was unable to attack the six-pack because it was willfully destroyed and this was critical. The prosecution undoubtedly benefited from its delays and destruction of evidence. A fair balancing of the four factors leads to the conclusion that Mr. Starr's right to a speedy trial was denied and this action should be dismissed.

This circuit decided two cases stemming from Doggett concerning the prejudice issue. In United States v. Shell, 974 F.2d 1035 (9th Cir. 1992), the Court of Appeal recognized that no showing of prejudice is necessary when the delay is great and attributable to the government.

In United States v. Beaman, 992 F.2d 1009 (9th Cir. 1993), the Court of Appeal found 17 and 20 month delays between indictment and arrest to be so "presumptively prejudicial" as to prompt a speedy trial inquiry. Id. at 1013.

It is clear that an arrest, coupled with filed charges, triggers the Sixth Amendment right to a speedy trial. See, United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); see also, United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed2d 696 (1982); see also, People v. Martinez, 37 Cal.App4th 1589, 44 Cal.Rtpr.2d 673 1995) [California Right to Speedy Trial "attaches upon the filing of the complaint."; quoting People v. Harmon, 19 Cal.3d 588 (1977)].

The arrest of petitioner, coupled with outstanding charges made him an "accused" by the rationale in Marion and MacDonald.

Once petitioner is afforded his Sixth Amendment rights, it follows that he was denied his right and the charges should have been dismissed.

C. Petitioner Was Denied His Fifth Amendment Due Process Rights

Shleffar v. Superior Court, 178 Cal.App.3d 937 (1986) and Scherling v. Superior Court, 22 Cal.3d 239 (1978) analyze the speedy trial issue. Each case requires **first** that prejudice from the delay be established by the defendant. Once established, the prosecution must then justify the delay, after which the court must "balance the harm to defendant against the reasons for the delay . . ." Shleffar, supra, at 945.

The actual prejudice to petitioner is apparent and not speculative. The faded memory of an alibi witness is not speculative, nor is the potential loss of concurrent sentences, nor is the harm done by lost photographic lineup evidence, which the trial court allowed in by hearsay evidence.

In Stabio v. Superior Court, 21 Cal.App.4th 1488 (1994), the court of appeal considered a situation in which there was a four year delay in arresting the defendant, who was charged with felony grand theft. The Court noted that Mr. Stabio had resided continuously in California with the last two and a half years at the same address, and had registered vehicles with the California Department of Motor Vehicles and lived basically openly and notoriously, without knowledge of the outstanding warrants against him. The Court in Stabio found that because the delay exceeded the statute of limitations for the crime, because law enforcement officials did not make even a minimal effort to locate Mr. Stabio from information in the public records, the presumption of prejudice was not extenuated or persuasively rebutted. The Stabio Court found that the statute of limitations is entitled to great weight in any speedy trial inquiry. As a result, the Court of Appeals issued a writ of mandate directing the trial court to vacate its order denying the motion to dismiss and enter a new order granting the dismissal consistent with their opinion. It follows from Stabio that as to the issue of prejudice to Mr. Starr, it must be found in his favor.

Any such balancing warrants reversal. As discussed above, the prejudice at hand is legally presumed and the actual prejudice is substantial. There is **no justification** for the delay. Any balancing invariably falls in petitioner's favor.

IV. CONCLUSION

For the above reasons, petitioner respectfully moves the court for a Certificate of Appealability on the issue of Petitioner's Fifth and Sixth Amendment rights.

Dated: March 31, 1999 /s/ Michael Artan

Michael Artan
Counsel for
Petitioner/Appellant
Robert Alan Starr

DECLARATION OF MICHAEL ARTAN

I, Michael Artan, declare:

1. I make this declaration in support of Petitioner-Appellant's motion for a certificate of appealability and statement of reasons why a certificate should issue.
2. The facts set forth in the above motion are found in the district court record of this case. I declare under penalty of perjury, under the laws of the United States of America that the foregoing is true and correct.

Dated: March 31, 1999 /s/ Michael Artan
Michael Artan

PROOF OF SERVICE
(C.C.P. Sections 1013(A), 2015.5)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 445 South Figueroa Street, Suite 3215, Los Angeles, California 90071.

On March 31, 1999, I served the within Petitioner-Appellant's Motion for a Certificate of Appealability and Statement of Reasons Why A Certificate Should Issue on all interested parties in said actions by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Jeffrey B. Kahan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90012

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited in the U.S. Mail on the same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter

date is more than one day after the date of deposition for mailing in affidavit.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct. Executed on March 30, 1999 at
Los Angeles, California.

/s/ Michelle Elhardouzi

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Filed:
May 03, 1999

ROBERT ALAN STARR, Petitioner-Appellant, v. CHERYL K. PLILER, Respondent-Appellee, And ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, Respondent-Appellee	NO. 99-55336 PETITIONER-APPELLANT'S MOTION TO RECONSIDER DENIAL OF MOTION FOR A CERTIFICATE OF APPEALABILITY AND STATEMENT OF REASONS WHY A CERTIFICATE SHOULD ISSUE; DECLARATION OF MICHAEL ARTAN [CIRCUIT RULE 27-10]

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Counsel for Petitioner-Appellant
Robert Alan Starr

Pursuant to Circuit Rule 27-10, petitioner/appellant Robert Alan Starr files this motion for reconsideration of the court's denial of his motion for a certificate of appealability and statement of reasons why a certificate should issue. The court's denial was filed on April 19 , 1999, without a stated reason other than citation to 28 U.S.C. section 2253 (c) (2).

Dated: May 1, 1999

/s/ Michael Artan
Michael Artan
Counsel for
Petitioner/Appellant
Robert Alan Starr

MOTION TO RECONSIDER DENIAL OF MOTION FOR A CERTIFICATE OF APPEALABIILTY AND STATEMENT OF REASONS WHY A CERTIFICATE SHOULD ISSUE

I INTRODUCTION

Petitioner/Appellant Robert Alan Starr ("Petitioner" or "Starr") has been denied his Sixth Amendment right to a speedy trial and his Fifth Amendment due process rights because of an unjustified five year delay in prosecution which resulted in prejudice to the defense. He was sentenced to the 17 years and 8 months in state prison.

Mr. Starr exhausted his state appellate rights. After timely presentation of his habeas corpus petition, and the district court's denial of the petition, the district court denied a certificate of appealability (COA). Petitioner then filed a timely motion, with this Court, for issuance of a COA. On April 19, 1999, this Court filed a denial of Mr. Starr's motion with no explanation except a citation to 28 U.S.C. section 2253 (c)(2).

Despite the apparent injustice of a five year delay in prosecution and despite the onerous sentence faced by Mr. Starr, he has no explanation for why his serious case will not be reviewed by this honorable court.

The Ninth Circuit Court of Appeals has been known as an institution in which all parties will finally be assured their fair day in court. Now, Mr.

Starr's chance to have his day in court has been denied with no explanation. The perception of fairness in its judiciary is an important concern which can bolster or undermine society's faith in its government. Without an explanation, there is no perception of fairness.

The puzzlement does not stop with the lack of an explanation, but is heightened by the fact that this Circuit has not stated what standard of review applies to issuance of a COA. At least six other circuits have determined a standard. The Ninth circuit has yet to do so. This circuit should determine a standard so that litigants may argue the merits of their cases.

In the instant case, the denial of petitioner's constitutional right was egregious, apparent and a certificate of appealability should issue.

II THE COURT SHOULD DETERMINE WHAT STANDARD OF REVIEW APPLIES TO ISSUANCE OF A COA.

A) There is no standard of review stated by this Circuit.

This Court of Appeals has jurisdiction only to consider claims for which a petitioner has made a substantial showing of a constitutional right. *See,* 28 U.S.C. Section 2253(c)(2).

According to 28 U.S.C. section 2253(c), a petitioner seeking appellate review must obtain a certificate of appealability.

In cases in which a district court denies a certificate, the petitioner may request a circuit judge

to issue the certificate. *See,* Rule 22, Federal Rules of Appellate Procedure.

If the district court denies a certificate of appealability, a petitioner may file with the Circuit Court a motion for a certificate of appealability along with a statement of reasons why a certificate should issue as to any issue, within thirty-five days of the district court entry of the denial order. *See,* Circuit Rule 22-1.

Yet, this Circuit has not yet stated the standard of review that applies to issuance of a COA. *See, United States v. Cruz-Mendoza,* 147 F. 3d 1069, n. 8 (9th Cir. 1998) ["We need not decide the exact contours of the 'substantial showing standard of section 2255(c)(2) . . .'"].

Without a standard ennunciated in this Circuit, litigants are left to put forth only half their arguments. Basically, litigants must state what happened in a motion without a standard to which they may tie their facts, with the blind hope that these facts may satsify an unstated standard. Without the guidance of a stated standard of review, the parties are left to vague arguments and the courts are left without a clear, and uniform, means of deciding the issue. Not only is there a lack of uniformity among the circuits, but there is no stated uniformity within the Circuit.

B) <u>This Circuit should adopt the standard of review applied to the issuance of certificate of probable cause to appeal</u>.

While this Circuit has failed to set a standard of review, at least six other circuits have done so, and

in doing so, they have applied the standard applied to issuance of a certificate of probable cause to appeal (CPC) which was in effect for state prisoners prior to passage of the Anti-Terrorism and Effective Death Penalty Act of 1996. *See , e.g., Tejeda v. Dubois ,* 142 F. 3d 18 (1st Cir. 1998); *Byrd v. Henderson,* 119 F. 3d 34 (D.C. Cir. 1997); *Lyons v. Ohio Adult Parole Authority,* 105 F. 3d 1063 (6th Cir.) *cert. denied,* 117 S. Ct. 1114 (1997); *Herrera v. United States,* 96 F. 3d 1010 (7th Circ. 1996); *Reyes v. Keane ,* 90 F. 3d 676 (2d Cir. 1996); *Lennox v. Evans,* 87 F. 3d 431 (10th Cir. 1997); *cert. denied,* 117 S. Ct. 746 (1997), *overruled on other grounds, United States v. Kunzman,* 125 F.3d 1363 (10th Cir. 1997).

The above CPC standard of review was set forth in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383 (1983). The standard in *Barefoot* is that a CPC should be granted if the petitioner makes a showing that "the issues are debatable among jurists of reason," and that , " a court could resove the issues [differently]; or that the questions are 'adequate to deserve encouragement to proceed further.'" *Id.,* at 893, n.4, 103 S. Ct. at 3394, n.4, *quoting Gordon v. Willis,* 516 F. supp. 911, 913 (N.D. Ga. 1980).

With six Circuits adopting the standard in *Barefoot v. Estelle, supra.,* this Circuit should join in as well.

III APPLICATION OF THE CPC STANDARD LEADS TO THE CONCLUSION THAT A COA SHOULD

ISSUE FOR BOTH OF APPELLANT'S ISSUES ON APPEAL.

A) Jurists of reason could debate whether petitioner was denied is Sixth Amendment right to a speedy trial and, in the alternative, the matter is adequate to deserve encouragement to proceed further.

The district court's findings below were premised on the mistaken notion that Mr. Starr was not arrested pursuant to a Los Angeles County when, in fact he was arrested pursuant to the Los Angeles warrant. The record substantiates Mr. Starr's account of being arrested on an Los Angeles warrant. So, the matter is at least worthy of an evidentiary hearing. Yet, the district court ignored the factual mistake and decided that the Sixth amendment right did not attach.

If the right attached at the time of his arrest, Mr. Starr was entitled to have his case dismissed.

Applying the four factors in *Barker v. Wingo* ,407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) , yields the inevitable conclusion that petitioner's case should have been dismissed. The length of delay is five times greater than what the is recognized as presumptively prejudicial. As to the next factor, the reason for the delay, it is indisputable that the prosecution and law enforcement failed completely. The evidence is conclusive that nothing was ever done to locate petitioner.

In *Doggett v. United States*, 505 U.S. 647, 112 S.Ct. 2686, 120 l>ed 2d 520 (1992), the court noted that "toleration of such negligence varies inversely

with its protractedness . . . and its consequent threat to the fairness of an accused's trial." Id. at 532. The court observed that the prosecution can hardly complain in that "persistent neglect in concluding a criminal prosecution indicates an uncommonly feeble interest in bringing an accused to justice; the more weight the government attaches to securing a conviction, the harder it will try to get it." Id.

The fact of the government's lack of diligence when combined with the seriousness of the charge make this case "adequate to deserve encouragement to proceed further." It follows that for this reason alone, the COA should issue.

Insofar as a defendant's assertion of his right to a speedy trial, the warrant did not appear on petitioner's 1988 and 1991 Presentence Reports. Additionally, the testimony revealed that there was never a detainer placed on petitioner while he was in federal custody until his late extradition. Information provided by petitioner's counsel at the time demonstrated that petitioner was unaware of the pending charges.

As to the fourth factor, prejudice to a defendant, the events at trail clearly demonstrate prejudice. The destruction of evidence and the difficulties in demonstrating petitioner's alibi defense makes absurd any assertion that there was no prejudice. It is well settled that there is a possibility of unfairness when photographic identifications are utilized.

Simmons v. United States, 390 U.S. 377, 378, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)[6]

This circuit decided two cases stemming from Doggett concerning the prejudice issue. In United States v. Shell, 974 F.2d 1035 (9th Cir. 1992), the Court of Appeal recognized that no showing of prejudice is necessary when the delay is great and attributable to the government.

In United States v. Beaman, 992 F.2d 1009 (9th Cir. 1993), the Court of Appeal found 17 and 20 month delays between indictment and arrest to be so "presumptively prejudicial" as to prompt a speedy trial inquiry. Id. at 1013.

It is clear that an arrest, coupled with filed charges, triggers the Sixth Amendment right to a speedy trial. See, United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971); see also, United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed2d 696 (1982); see also, People v. Martinez, 37 Cal.App4th 1589, 44 Cal.Rtpr.2d 673 1995) [California Right to Speedy Trial "attaches upon the filing of the complaint."; quoting People v. Harmon, 19 Cal.3d 588 (1977)].

The arrest of petitioner, coupled with outstanding charges made him an "accused" by the rationale in Marion and MacDonald.

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[6] In Simmons, the prosecution did not even refer to the photographs in their case-in-chief. The defense was contending that because the photographs were unavailable in discovery, there was a violation of the discovery requirements of the Jencks Act.

The district court did not even make the effort of setting an evidentiary hearing on the vital issue of whether Mr. Starr was arrested pursuant to the Los Angeles warrant.

A cursory examination of the above factors must lead to the conclusion that jurists of reason can debate the issues above, could resolve the issues differently, and that the questions are adequate to deserve encouragement to proceed further.

B. Jurists of reason could debate whether petitioner was denied his Fifth Amendment due process rights, or, a court could resolve the issue differently, or, the issue is adequate to deserve encouragement to proceed further.

Shleffar v. Superior Court, 178 Cal.App.3d 937 (1986) and Scherling v. Superior Court, 22 Cal.3d 239 (1978) analyze the speedy trial issue. Each case requires first that prejudice from the delay be established by the defendant. Once established, the prosecution must then justify the delay, after which the court must "balance the harm to defendant against the reasons for the delay . . ." Shleffar, supra, at 945.

Notwithstanding the lower court's findings, the actual prejudice to petitioner is apparent and not speculative. The faded memory of an alibi witness is not speculative, nor is the potential loss of concurrent sentences, nor is the harm done by lost photographic lineup evidence, which the trial court allowed in by hearsay evidence.

In Stabio v. Superior Court, 21 Cal.App.4th 1488 (1994), the court of appeal considered a situation in which there was a four year delay in arresting the defendant, who was charged with felony grand theft. The Court in Stabio found that because the delay exceeded the statute of limitations for the crime, because law enforcement officials did not make even a minimal effort to locate Mr. Stabio from information in the public records, the presumption of prejudice was not extenuated or persuasively rebutted. The Stabio Court found that the statute of limitations is entitled to great weight in any speedy trial inquiry. Any such balancing warranted reversal. As discussed above, the prejudice at hand is legally presumed and the actual prejudice is substantial. There was **no justification** for the delay, so it follows that any balancing invariably falls in petitioner's favor.

To deny petitioner a COA is to say that there can be no debate about whether there was prejudice to Mr. Starr. To deny him a COA is to say that no court could resolve this case differently. To deny Mr. Starr a COA is to say that this issue is not adequate to deserve encouragement to proceed further.

IV CONCLUSION

For the above reasons, petitioner again respectfully moves the court for a Certificate of Appealability on the issue of Petitioner's Fifth and Sixth Amendment rights.

Dated: May 1, 1999

/s/ Michael Artan
Michael Artan
Counsel for
Petitioner/Appellant
Robert Alan Starr

CERTIFICATE OF COMPLIANCE

I, MICHAEL ARTAN, certify that this Motion to Reconsider does not exceed ten monotype, double spaced pages, or 2800 words.

Dated: May 1, 1999

/s/ Michael Artan

Michael Artan

PROOF OF SERVICE

(C.C.P. Sections 1013(A), 2015.5)

STATE OF CALIFORNIA, . COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of 18 years and not a party to the within action; my business address is 445 South Figueroa Street, Suite 3215, Los Angeles, California 90071.

On May 1, 1999, I served the within Petitioner-Appellant's Motion to Reconsider on all interested parties in said actions by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Jeffrey B. Kahan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90012

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited in the U.S. Mail on the same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposition for mailing in affidavit.

I declare under penalty of perjury, under the laws of the United States of America, that the

foregoing is true and correct. Executed on May 1, 1999 at Los Angeles, California.

/s/ Michael Artan